

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JORGE ROSALES,

Plaintiff(s),

v.

BELLAGIO, LLC,

Defendant(s).

Case No. 2:17-CV-3117 JCM (VCF)

ORDER

Presently before the court is defendant Bellagio, LLC's ("Bellagio") renewed motion for summary judgment. (ECF No. 45). Plaintiff Jorge Rosales responded in opposition (ECF No. 49) to which Bellagio replied (ECF No. 52).

I. BACKGROUND

Jorge Rosales is a former Bellagio room service food server. (ECF No. 45 at 3). After eighteen years of service, he injured his neck, back, and shoulder on the job in May 2014 and underwent shoulder surgery. (*Id.* at 3). In March 2016, Rosales's doctor recommended that he "return to work with permanent restrictions including maximum lifting of 36 pounds and avoidance of repetitive movements of the neck and avoidance of repetitive reaching overhead on the right side." (*Id.* at 4). Rosales was terminated in April 2016 after an unsuccessful assisted job search process. (*Id.* at 10). He alleges that Bellagio failed to provide a reasonable accommodation in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(b)(5)(A). (Compl., ECF No. 1-1).

Bellagio previously moved for summary judgment, contending that Rosales admitted he could not do the essential functions of the job with a reasonable accommodation and that it reached this conclusion after a good faith interactive process. (Order, ECF No. 28 at 7).

1 The court granted summary judgment for Bellagio. (*Id.*). The court applied the *McDonnell-*
 2 *Douglas* burden-shifting framework and held that Rosales failed to raise a genuine issue of
 3 material fact as to pretext. (*Id.* at 8).

4 In a 2-1 decision, the Ninth Circuit reversed. (Mem., ECF No. 36). It held that the
 5 court incorrectly applied the more general disability discrimination standard rather than the
 6 more specific law on failure-to-accommodate claims. (*Id.* at 2–3). It also added that the
 7 court’s order was not “internally consistent” and “congruent with the arguments of the
 8 parties.” (*Id.* at 3). Writing in dissent, Judge Patrick Bumatay agreed that the court applied
 9 the wrong legal standard but saw no reason to remand the case for the court to merely reenter
 10 summary judgment for Bellagio because “Rosales can’t show any reasonable
 11 accommodation exists here.” (*Id.* at 9–10 (citing *Snapp v. United Transp. Union*, 889 F.3d
 12 1088, 1095 (9th Cir. 2018)). Bellagio now renews its motion for summary judgment. (ECF
 13 No. 45).

14 **II. LEGAL STANDARD**

15 Summary judgment is proper when admissible evidence in the record shows that
 16 “there is no genuine dispute as to any material fact and the movant is entitled to a judgment
 17 as a matter of law.”¹ Fed. R. Civ. P. 56(a). The purpose of summary judgment is “to isolate
 18 and dispose of factually unsupported claims or defenses,” *Celotex Corp. v. Catrett*, 477 U.S.
 19 317, 323–24 (1986), and to avoid unnecessary trials on undisputed facts. *Nw. Motorcycle*
 20 *Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

21 When the moving party bears the burden of proof on a claim or defense, it must
 22 produce evidence “which would entitle it to a directed verdict if the evidence went
 23 uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474,
 24 480 (9th Cir. 2000) (internal citations omitted). In contrast, when the nonmoving party bears

26 ¹ The court can consider information in an inadmissible form at summary judgment if
 27 the information itself would be admissible at trial. *Fraser v. Goodale*, 342 F.3d 1032, 1036
 28 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253 F.3d 410, 418–19 (9th Cir. 2001)
 (“To survive summary judgment, a party does not necessarily have to produce evidence in a
 form that would be admissible at trial, as long as the party satisfies the requirements of
 Federal Rules of Civil Procedure 56.”)).

1 the burden of proof on a claim or defense, the moving party must “either produce evidence
 2 negating an essential element of the nonmoving party’s claim or defense or show that the
 3 nonmoving party does not have enough evidence of an essential element to carry its ultimate
 4 burden of [proof] at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102
 5 (9th Cir. 2000).

6 If the moving party satisfies its initial burden, the burden then shifts to the party
 7 opposing summary judgment to establish a genuine issue of material fact. *See Matsushita*
 8 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). An issue is “genuine” if
 9 there is a sufficient evidentiary basis on which a reasonable factfinder could find for the
 10 nonmoving party and a fact is “material” if it could affect the outcome of the case under the
 11 governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

12 The opposing party does not have to conclusively establish an issue of material fact in
 13 its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.
 14 1987). But it must go beyond the pleadings and designate “specific facts” in the evidentiary
 15 record that show “there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324. In other
 16 words, the opposing party must show that a judge or jury has to resolve the parties’ differing
 17 versions of the truth. *T.W. Elec. Serv.*, 809 F.2d at 630.

18 The court must view all facts and draw all inferences in the light most favorable to the
 19 nonmoving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990); *Kaiser Cement*
 20 *Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). The court’s role is
 21 not to weigh the evidence but to determine whether a genuine dispute exists for trial.
 22 *Anderson*, 477 U.S. at 249.

23 **III. DISCUSSION**

24 To establish a prima facie case for discrimination under the ADA, the employee must
 25 show that (1) he is disabled within the meaning of the ADA, (2) he is a qualified individual
 26 able to perform the essential functions of the job with reasonable accommodation, and (3) he
 27 suffered an adverse employment action because of his disability. *Samper v. Providence St.*
 28

1 *Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (examining the essential functions of
2 an NICU nurse).

3 “[O]nce an employee requests an accommodation . . . the employer must engage in
4 an interactive process with the employee to determine the appropriate reasonable
5 accommodation.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002); *see*
6 *also* 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o)(3). But “there exists no stand-alone
7 claim for failing to engage in [an] interactive process. Rather, discrimination results from
8 denying an available and reasonable accommodation.” *Snapp*, 889 F.3d at 1095.

9 Thus, to survive summary judgment, the employee must identify “the existence of a
10 [facially] reasonable accommodation.” *Dark v. Curry Cnty.*, 451 F.3d 1078, 1088 (9th Cir.
11 2006). Or in the words of Judge Bumatay: “Our decisions now hold that an employer may
12 still prevail on a summary judgment motion—despite a genuine dispute as to good-faith
13 participation in the interactive process—if the employer proves no reasonable
14 accommodation is available.” (ECF No. 36 at 8).

15 Essential functions of a job are “fundamental job duties” and not “marginal functions
16 of the position.” 29 C.F.R. § 1630.2(n)(1). A function can be essential for many reasons,
17 including whether the job exists to do the function, the “limited number of employees
18 available” who can do the function, and if the function is “highly specialized.” *Id.* §
19 1630.2(n)(2). Evidence of whether a function is essential includes the employer’s judgment,
20 the job description, the time spent on the function, and the consequences of not doing the
21 function. *Id.* § 1630.2(n)(3). The inquiry is fact-specific and the employer has the burden of
22 production in establishing what job functions are essential. *Samper*, 675 F.3d at 1237.

23 Although a “reasonable accommodation” can include adjusting physical facilities,
24 work schedules, equipment, or even some job restructuring, it does not include eliminating
25 essential functions of a job. *See* 29 C.F.R. § 1630.2(o)(2)(ii). In other words, an employer
26 need not “convert a temporary light-duty position into a permanent one” or effectively
27 “create a new position.” *Rund v. Charter Commc’ns, Inc.*, 319 F. App’x 465, 467 (9th Cir.
28 2008) (citation omitted). Whether a reasonable accommodation exists is ordinarily a

1 question of fact for a jury. *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th
2 Cir. 2010) (citing *Lujan v. Pac. Mar. Ass’n*, 165 F.3d 738, 743 (9th Cir. 1999)).

3 **A. Rosales’s description of the essential functions of a food server and his**
4 **requested accommodations**

5 In his deposition testimony, Rosales divides the functions of a food server into three
6 categories: (1) room service orders, (2) hospitalities, and (3) side work. (*See* Morales Dep.,
7 ECF No. 45-1 at 5; *see also* ECF No. 49 at 7, 24). In a later declaration, Rosales averred that
8 he could do “regular room services including loading, pushing and pulling regular tables
9 loaded with regular orders and two hotboxes” and “unload the food where the guest would
10 want it with no problem.” (Rosales Decl., ECF No. 49-4 at 4). He could place heavier room
11 service orders onto a rolling table and push them to a room, a common practice for all food
12 servers. (ECF No. 49 at 8, 24).

13 Rosales argues that hospitality tasks are optional and *not* an essential function. The
14 job description does not mention hospitalities. (*Id.* at 25). And “[n]o server was required to
15 do the [hospitalities] rotation, [] the lifting weights involved were not encompassed in the
16 essential functions, and [] there was no specialized knowledge required to perform the task.”
17 (*Id.*). And even if hospitality tasks are an essential function, a reasonable accommodation
18 would be to not assign Rosales to such tasks based on Bellagio’s past accommodations. (*Id.*
19 at 25–26 (citing *Wong v. Regents of Univ. of California*, 192 F.3d 807, 820 (9th Cir. 1999))).

20 Rosales argues that side work is not essential either “even though it is listed in the job
21 description.” (*Id.* at 26). “It is undisputed that prep/side work and stocking assignments
22 could be done by any server, and that side work tasks were assigned daily by the managers
23 on a rotation basis, so servers were not stuck doing the same thing.” (*Id.*). And again, even
24 if side work is an essential function, there is a side work task Rosales could do—cleaning the
25 beverage area—which now requires Bellagio to show why this accommodation would be an
26 undue hardship. (*Id.* at 29).

27 Given Rosales’s description of the job, he says there is a factual dispute over the
28 essential functions and “a reasonable jury could find that the optional hospitalities and side

1 work were not essential functions, but marginal functions that other servers could perform,
 2 and that the server position could be restructured as a reasonable accommodation.” (*Id.* at
 3 27).

4 **B. There is no genuine dispute over the essential functions of the job and the**
 5 **unreasonableness of Rosales’s requested accommodations**

6 The court finds that there are no reasonable accommodations that would have allowed
 7 Rosales to do the essential functions of a food server. Rosales requests three
 8 accommodations: (1) modified room service orders that do not require lifting more than 36
 9 pounds or reaching overhead, (2) a full exemption from hospitality tasks, and (3) an
 10 exemption from almost all side work tasks like carrying jugs, reaching high shelves,
 11 restocking heavy items, and folding tables. (ECF No. 52 at 9). Alternatively, if side work
 12 and hospitality tasks are nonessential as Rosales contends, this leaves food servers with few,
 13 if any, essential functions.

14 Bellagio determines the duties of its food servers and the court hesitates to second-
 15 guess its determinations. *See* 42 U.S.C. § 12111(8). Thus, “if an employer has a legitimate
 16 reason for specifying multiple duties [of a job], duties the [employee] is expected to rotate
 17 through, a disabled employee will not be qualified for the position unless he can perform
 18 enough of these duties to enable a judgment that he can perform its *essential* duties.” *Miller*
 19 *v. Illinois Dep’t of Corr.*, 107 F.3d 483, 485 (7th Cir. 1997) (Posner, C.J.) (emphasis in
 20 original); *see also Basith v. Cook Cnty.*, 241 F.3d 919, 929 (7th Cir. 2001) (“It is possible
 21 that any function, whether or not essential, could be assigned to additional employees. The
 22 mere fact that others could do [plaintiff’s] work does not show that the work is
 23 nonessential.”).

24 The record supports Judge Bumatay’s conclusion that Rosales is “incapable of
 25 performing” side work which is “undisputed[ly]” an essential function of a food server.
 26 (ECF No. 36 at 4). Rosales readily testified that he cannot do most of the side work. (ECF
 27 No. 45-1 at 8–10, 32–33). Specifically, he admitted he cannot carry a gallon of milk or juice
 28 from the refrigerator or fold and unfold tables. (*Id.*). Yet Bellagio lists side work in the job

1 description for a room service food server. (ECF No. 45-3). And the consequence of not
 2 doing side work is that areas would be left unclean and unstocked, leading to servers not
 3 bringing food to guests. (ECF No. 52 at 13; Gholizadeh Dep., ECF No. 49-3 at 17–25
 4 (describing rotating side work tasks)); *see also* 29 C.F.R. § 1630.2(n)(3)(iv). And as
 5 aforementioned, just because other food servers could pick up the slack for Rosales is not
 6 enough to put the essential nature of a food server’s side work in genuine dispute.

7 And besides, Rosales’s opinions and speculation cannot create a genuine dispute
 8 especially when Bellagio’s determinations of the essential functions of the job receive
 9 considerable deference. *See Lezama v. Clark Cty.*, 817 F. App’x 341, 345 (9th Cir. 2020).
 10 In fact, his deposition testimony suggest it is impossible for food servers to avoid hospitality
 11 tasks for large parties during most shifts. (Rosales Dep., ECF No. 52-2 at 3–4); *see* 29
 12 C.F.R. § 1630.2(n)(2)(ii). And his testimony casts doubt on whether he can even do
 13 modified room service orders without getting hurt as the job “requires a lot of neck
 14 movements for everything” and Rosales could not sit through a GED course without
 15 experiencing debilitating neck pain. (Rosales Dep., ECF No. 45-1 at 12, 28–29, 38–39).

16 In short, the court agrees with Judge Bumatay’s assessment of the record: “Bellagio
 17 has demonstrated that Rosales could not perform the essential functions of his job, and that
 18 there was no accommodation available to change that fact.” (ECF No. 36 at 5). Because the
 19 ADA does not require exempting Rosales from the essential functions of hospitalities and
 20 side work or to reallocate these functions to other food servers, *see Dark*, 451 F.3d at 1088,
 21 summary judgment is granted for Bellagio.

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1 **IV. CONCLUSION**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Bellagio's motion for
4 summary judgment (ECF No. 45) be, and the same hereby is, GRANTED. The clerk shall
5 enter final judgment for Bellagio and close this case.

6 DATED March 1, 2021.

7 
8 UNITED STATES DISTRICT JUDGE